

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Marc Spitzer, Philip D. Moeller,
and Jon Wellinghoff.

Public Service Company of New Mexico

Docket No. ER05-741-000

ORDER APPROVING CONTESTED SETTLEMENT

(Issued February 27, 2007)

1. On April 12, 2006, as corrected April 18 and 20, 2006, Public Service Company of New Mexico (PNM) filed a Stipulation and Agreement (Settlement) in this proceeding pursuant to Rule 602 of the Commission's Rules of Practice and Procedure.¹ PNM asserts that the Settlement comprehensively resolves all issues set for hearing in the Commission's Order Accepting and Suspending Proposed Rates and Establishing Hearing and Settlement Judge Procedures issued May 25, 2005 (May 25, 2005 Order).²

2. The Incorporated County of Los Alamos, New Mexico (Los Alamos), the Commission's Trial Staff (Staff), and PNM filed comments in support of the Settlement. No party opposed the Settlement, but the Staff proposed a minor change to the language regarding modifications to the Settlement. As discussed below, the Settlement constitutes a reasonable resolution of this proceeding and will be approved.

Background

3. On March 30, 2005, PNM filed a notice of change in rates for transmission delivery services provided by PNM under its Open Access Transmission Tariff (OATT), FERC Electric Tariff, Second Revised Volume No. 4, and under several non-OATT bilateral contracts between PNM and its firm transmission service customers. The filing also included: (1) a revision to the OATT to clarify that PNM may provide point-to-point transmission service on an hourly basis; (2) revisions to the system loss factor applicable to transmission delivery services under the OATT and the non-OATT bilateral contracts; (3) revisions to PNM's Electric Coordination Tariff, designated as PNM's FERC Electric

¹ 18 C.F.R. § 385.602 (2006).

² *Public Service Company of New Mexico*, 111 FERC ¶ 61,245 (2005).

Tariff, Volume No. 5, to reflect the proposed revised rates under the OATT; and (4) revisions to the PNM Resources Operating Companies FERC Electric Tariff, Original Volume No. 1 (PNM Resources OATT), which was filed to replace the OATT upon consummation of the acquisition of TNP Enterprises, Inc. by PNM Resources, Inc.

4. The Commission issued notice of PNM's filing on April 5, 2005. Various parties filed motions to intervene and/or protests, and PNM filed its response to the protests on May 5, 2005. In the May 25, 2005 Order, the Commission stated that PNM's filing raised issues that could not be resolved on the existing record, and that the Commission's preliminary analysis of the filing indicated that the proposed rates might be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful. The Commission accepted PNM's proposed rates for filing and suspended implementation for five months, with the proposed rates to go into effect, subject to refund, on November 1, 2005. The Commission held the hearing in abeyance pending the outcome of settlement judge procedures. The parties engaged in formal settlement conferences on July 20, 2005, November 3, 2005 and January 12, 2006, and also participated in informal settlement discussions throughout the process.

The Settlement

5. The designated Settlement Judge issued his report to the Commission and the Chief Administrative Law Judge on June 1, 2006. The Settlement Judge found that the Settlement comprehensively resolves all issues set for hearing in the May 25, 2005 Order.

6. The Settlement provides that the Annual Transmission Revenue Requirement (ATRR) for Network Integration Service provided by PNM pursuant to the PNM Resources OATT shall be \$58,500,000 (Settlement ATRR). The Settlement further states that the rate for firm point-to-point transmission services provided by PNM pursuant to the PNM Resources OATT and bilateral non-OATT contracts for transmission services shall be \$2.07/kW-month, which is the rate that was in effect prior to PNM's filing in this docket. The Settlement provides that, with respect to Contract No. P0695 between PNM and the Western Area Power Administration, this rate will be adjusted consistent with the terms of that contract. Finally, the Settlement provides that other rates for point-to-point transmission services that PNM provides pursuant to the PNM Resources OATT shall be conformed to the \$2.07/kW-month rate based on the use of 12 months per year for yearly service, 8,760 hours per year for hourly service, 52 weeks per year for weekly service, and 365 days per year for daily service (collectively, Settlement Rates).

7. The Settlement establishes that the energy loss factor for transmission service provided by PNM pursuant to the PNM Resources OATT and the bilateral non-OATT contracts shall be three percent (Settlement Losses), which was the system loss factor in effect under the OATT and the bilateral non-OATT contracts prior to PNM's filing in this docket.

8. The Settlement states that each of the provisions described above will have an effective date of November 1, 2005. Pursuant to the Settlement, PNM will refund the amounts collected in excess of the amounts that would have been collected under the Settlement ATRR, the Settlement Rates, and the Settlement Losses, and will calculate the interest in accordance with the method set forth in 18 C.F.R. § 35.19 (a) (2006). The Settlement also provides for a loss factor credit for losses that were self-provided by any customer. Specifically, PNM agrees to credit an amount of energy equal to the difference between losses using a three-percent loss factor and losses using a 3.95 percent loss factor for each month of service since November 1, 2005, increased by a percentage equal to the average of the interest rates used to calculate interest on refunds from November 1, 2005, until fully credited.

9. The Settlement provides that any request for modification to the Settlement that is not agreed upon by all parties shall be subject to the *Mobile-Sierra* public interest standard of review. If any non-party or the Commission requests any modifications, the Settlement specifies that the standard of review shall be the most stringent standard permissible under applicable law.

Comments by the Parties

10. Los Alamos supports the Settlement and recommends that it be approved expeditiously and without modification.

11. Staff's initial comments indicate that it supports the Settlement as a fair and reasonable resolution of this proceeding. However, Staff takes issue with the standard of review specified in the Settlement in the event that a non-party or the Commission proposes a modification to the Settlement. The Settlement provides that such modifications are to be held to the most stringent standard under applicable law. Staff maintains that the Commission cannot be held to this standard, which Staff characterizes as vague. Staff also notes that PNM did not explain why the Commission should be held to a different standard than the settling parties. Therefore, Staff proposes that the Commission also be subject to the *Mobile-Sierra* public interest standard and that the Settlement be revised accordingly.

12. PNM submitted reply comments in order to address Staff's request to modify the standard of review provision. PNM argues that Staff has not provided any valid rationale to modify that provision, and PNM further observes that Staff does not object to applying this standard to non-parties. PNM contends that the language to which Staff objects appears in other recent settlements that the Commission has approved without modification. Consequently, PNM opposes the modification as proposed by Staff, and requests that the Settlement be approved without modification.

Commission Analysis

13. Because of the Staff's comments regarding the applicable standard of review, the Settlement Judge determined that the Settlement must be deemed contested. However, he recognized that the Settlement otherwise comprehensively resolves all issues set for hearing in the May 25, 2005 Order. The Settlement Judge found that the Settlement presents no issues of first impression, impacts no other Commission proceedings, and has no Commission policy implications except insofar as it purports to bind the Commission with respect to the applicable standard of review. Accordingly, the Settlement Judge transmitted the Settlement to the Commission and recommended that settlement judge procedures in this docket be terminated.

14. The Settlement constitutes a reasonable resolution of this proceeding and will be approved. Staff's comments do not go to the merits of the Settlement, but instead relate only to the standard of review to be applied to proposed modifications of the Settlement by non-parties or the Commission. The other comments addressing the Settlement support it on its merits. The Commission previously has accepted other settlements containing the language cited by the Staff, and finds such language no bar to approval of the instant Settlement.³

The Commission orders:

The Settlement is hereby approved, as discussed in the body of the order.

By the Commission. Commissioner Kelly not participating.
Commissioner Wellinghoff dissenting in part with a separate statement attached.

(S E A L)

Magalie R. Salas,
Secretary.

³ See *Midwest Independent Transmission System Operation, Inc.*, 115 FERC ¶ 61,183 (2006); *American Electric Power Service Corp.*, 113 FERC ¶ 61,294 (2005).

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WELLINGHOFF, Commissioner, dissenting in part:

The parties in this case have asked the Commission to apply the “public interest” standard of review when it considers future changes to the instant settlement that may be sought by any of the parties. With regard to changes that may be sought by either a non-party or the Commission acting *sua sponte*, the parties have asked the Commission to apply the “most stringent standard permissible under applicable law.”

The Commission has previously interpreted the request to apply the “most stringent standard permissible under applicable law” as warranting application of the “public interest” standard of review.¹ Because the facts of this case do not satisfy the standards that I identified in *Entergy Services, Inc.*,² I believe that it is inappropriate for the Commission to agree to apply the “public interest” standard of review to future changes to the settlement sought by a non-party or the Commission acting *sua sponte*.

For this reason, I respectfully dissent in part.

Jon Wellinghoff
Commissioner

¹ *Midwest Indep. Transmission Sys. Operator, Inc.*, 117 FERC ¶ 61,162 at P 3 (2006).

² 117 FERC ¶ 61,055 (2006).